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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

———— TERM, 1971

No. Misc.

VINCENT FORCHELLI and
CHARLES N. FORCHELLI,

Petitioners,

v.

LUCIE DOLORES HART as Administratrix of the Estate of TIMOTHY J. HART, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HAROLD L. COWIN

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IN THE

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No. Misc.

VINCENT FORCHELLI and
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v.

LUCIE DOLORES HART as Administratrix of the Estate of TIMOTHY J. HART, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners, Vincent Forchelli and Charles N. Forchelli, respectfully pray that a writ of certiorai issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 21, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet reported appears in the appendix hereto at pp. 1a-4a. No opinion was rendered by the District Court for the Eastern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 21, 1971. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. §1254 (1).

Questions Presented

1. Whether the Circuit Court of Appeals erred in its refusal to set aside or reduce as excessive the judgment of the District Court entered upon a verdict for plaintiff-respondent in the sum of $252,000., in a wrongful death action brought pursuant to Article 5, *Estates Powers & Trusts Law of New York* (1967), §5-4.3 for the wrongful death of an 18 year old college freshman.

2. Whether the Circuit Court's refusal to follow and be bound by decisions of the New York Courts with respect to damages for wrongful death, brought under Article 5, *Estates Powers & Trusts Law* (1967), §5-4.3 of the Laws of New York was a denial to petitioner of due process of law under the *Fourteenth Amendment to the United States Constitution.*

3. Whether the decision of the Second Circuit, that it was not bound by New York State decisional law in assessing the damages due plaintiff is in conflict with the decisions of the Ninth Circuit Court of Appeals requiring this Honorable Court to determine which of the Circuit Court decisions is to be followed.

4. Whether the Circuit Court erred by wrongfully computing petitioner's loss based upon a discount for present value.

Statutory Provisions Involved

Fourteenth Amendment to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 5, Estates Powers & Trusts Law of New York (1967), §5-4.3:

> "The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the de-

cedent's death shall be added to and be a part of the total sum awarded. L. 1966, c. 952, eff. Sept. 1, 1967."

Statement of the Case

Respondent's intestate, an 18 year old college freshman was killed when petitioners' car in which respondent's intestate was a passenger turned over. The accident occurred on April 20, 1969 on James Street, Syracuse, New York. Respondent's intestate was an Honors freshman student at Syracuse University, Syracuse, New York. At the time of the accident respondent's intestate was 18½ years of age, having been born on October 24, 1950.

The action was brought in the District Court, based upon diversity of citizenship between the respondent, a resident of the State of Connecticut and petitioners, residents of the State of New York. The action was brought pursuant to Article 5, Estates Powers & Trusts Law of New York (1967), §5-4.3 by the deceased's mother as sole survivor and was limited to her pecuniary loss under the New York Statute.

At the trial in District Court and in the Circuit Court of Appeals petitioners conceded that decedent had an average I.Q. of 134; had graduated from high school with a 92.09 average and ranked 4 in his Honors program class at Syracuse University and was attending college under a full tuition scholarship.

There was some testimony that decedent might study law or journalism and that he intended to support his mother, the respondent.

There was testimony that petitioner was self-supporting and netted $75. weekly from her job.

In the Circuit Court of Appeals petitioner argued: (1) that the verdict of the jury was excessive, based upon

passion and prejudice; (2) that the trial court correctly instructed the jury on the New York Law of damages for wrongful death within the meaning of Article 5, Estates Powers & Trusts Law (1967), §5-4.3, but that the jury misapplied the law; (3) that the Circuit Court was bound to follow the New York Law of damages for wrongful death as set forth in the Statute and in New York Decisional Law, in evaluating the jury verdict; (4) that the jury misapplied the New York Law with respect to discounting for present value and that by any rational computation based upon New York Law, the verdict was grossly excessive; (5) that the trial court erred in refusing to grant petitioner's motion to set aside the verdict.

The Circuit Court, in its opinion, set out at p. 4a of the Appendix to this Petition, refused to follow and be bound by the Decisional Law of the State of New York, *Lex Loci* of the accident and where decedent and petitioners resided and despite the fact that respondent's action was based solely upon Article 5, Estates Powers & Trusts Law of New York (1967), §5-4.3.

The Circuit Court in its opinion failed properly to compute and set forth its computations of respondent's pecuniary loss, based upon the New York Statute and properly discount said sum based on present value.

REASONS FOR GRANTING THE WRIT

The Circuit Court, by refusing to apply New York decisional law in assessing the excessive nature of the instant verdict and judgment promotes "forum shopping" and sets out the Federal Courts as the optimum forum for recovery of exhorbitant verdicts.

The instant case is a prime example of "forum shopping" by respondent, a resident of Connecticut, who could

have brought her action in the New York State Supreme Court. However, recognizing the New York Appellate Court's limitation on recovery in cases of this kind respondent purposely chose the Federal Forum, *Covey Gas & Oil Co.* v. *Checketts* (C. C. A. 9th, 1951), 187 F. 2d 562; *Horowitz, Erie R.R. Co.* v. *Tompkins—A Test to Determine Those Rules of State Law to Which Its Doctrine Applies,* 23 So. Calif. Law Rev. 204, 215.

The respondent herein, the mother of decedent, an 18 year old college honors freshman, was awarded $252,000. for her pecuniary loss, in an action brought pursuant to Article 5, *Estates Powers & Trusts Law of New York,* §5-4.3. Relevant New York Appellate Court decisions in comparable cases have limited the maximum recovery to between $30,000. and $35,000., *Alfieri* v. *Cabot Corp.,* 17 A. D. 2d 455 (1962), 27 year old male earning in excess of $5,000. per year, contributing $2,600. per year to parents, verdict of $180,000. reduced to $30,000.; *Breckir* v. *Lewis,* 21 A. D. 2d 546 (1964), 21 year old bright female college student, verdict of $75,000. reduced to $35,000.; *LeBoeuf* v. *Newman,* 21 A. D. 2d 937 (1964), 17 year old male, exceptional high school junior, verdict of $55,000., reduced to $35,000.; *Lawler* v. *Nucastle Motors Leasing Inc.,* 35 A. D. 2d 450 (1970), 23 year old working female contributing $50. per week to divorced, unemployed mother, verdict of $55,000., reduced to $30,000.

The disparity of the instant verdict of $252,000. is obvious and its excessiveness is made more certain when the record is barren of any claim that respondent, 43 years of age, is in ill health and the record indicates that respondent is employed without claim that she is not self-supporting or that her mode of living was substandard.

The award of $252,000. even if invested conservatively at 5% will yield $12,600. yearly without ever invading the principal.

The Circuit Court in applying its own standards to determine the excessiveness of this verdict, and in refusing to apply New York Appellate Court standards to the verdict, has broadcasted an open invitation to plaintiffs to seek relief, wherever possible, exclusively in the Federal Courts.

The refusal of the Circuit Court to be bound by the decisions of the New York Appellate Courts clearly promotes the institution of personal injury litigation in the Federal Courts as the optimum forum. The trend toward using the Federal Court for this type of litigation is on the increase and as a result of this decision will probably increase at an accelerated pace.* This Honorable Court should grant petitioner's writ.

The 14th Amendment §1 of the United States Constitution prohibits the taking of property without due process of law.

It is respectfully submitted that if the Circuit Court is permitted to apply its own individual standards without regard to the relevant New York Decisional Law a defendant can never assess its financial obligation. No attorney can ever properly evaluate his client's responsibility. Settlement at any price demanded by plaintiff must

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*The administrative office of the United States Courts, Annual Report of the Director 1970, reveals that: The number of districts which terminated more cases than were filed dropped from 32 in 1969 to 13 in 1970 (II-33); that there were 96 tort cases pending in the Eastern District Court of New York in 1970, of which 73 had been commenced in 1970 (tables C-3 & C-3a); that of 338 pending tort cases in the Southern District of New York, 149 had been commenced in 1970 (tables C-3 & C-3a); there were 13,794 tort actions based on diversity of citizenship commenced in 1969-1970 (of which 7,621 were motor vehicle torts).

be the standard, without regard to the obligation to defend his client and protect his rights, even though the accident occurred in New York, and the parties (decedent) resided in New York and though the action is allegedly governed by New York substantive law, both as to liability and damages, *Frasier* v. *Public Service Interstate Transportation Co.*, 244 F. 2d 668 (C. C. A. 2, 1957).

Thus, the defendant in Federal Court is forced to settle every case of liability at plaintiff's price regardless of its reasonable value in New York State Courts or run the risk of financial ruin and additional litigation.

"Due process is a growth too sturdy to succumb to the infection of the least ingredient of error", *Roberts* v. *New York* (1935), 295 U. S. 264, 278.

Mr. Justice Frankfurter, in *Wolf* v. *Colorado* (1949), 338 U. S. 25, 27, aptly stated:

> "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what at a given time be deemed the limits or essentials of fundamental rights."

It is respectfully submitted that it is not "reasonable and right" to force petitioners-defendants to settle at any price demanded by plaintiffs (respondent) by using the Federal Court system as a weapon.

It is respectfully submitted that defendants (petitioners) rights to due process are being violated by the Circuit Court's decision herein within the full meaning of the Constitution.

The Circuit Court violated its own previous decisions in refusing to be bound by New York law and its opinion is in direct conflict with that of the Ninth Circuit.

This case was tried pursuant to Article 5, *Estates Powers & Trusts Law of New York* (1967), §5-4.3. The action is solely a creature of statute and limits recovery to the actual pecuniary loss of decedent's survivor. No action for wrongful death existed under common law.

The District Court instructed the jury on the New York law as to the measure of damages for wrongful death.

It is clear that the Trial Court recognized his obligation to instruct the jury on the New York Law as the measure of damages. Surely if the jury was instructed as to the New York Law with respect to the measure of damages, the Circuit Court was bound to examine the verdict of the jury within the perimeter of New York Law.

The Circuit Court of Appeals in its opinion (pp. 1a-4a Appendix) stated that in reviewing the excessiveness of the verdict it was not bound by New York Law. This decision was in violation of its own decisional law, *Frasier* v. *Public Service Interstate Transportation Co.*, 244 Fed. 2d 668 (1957), and in conflict with decisions of the Circuit Court of Appeals for the 9th Circuit: *Johnson* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co., Covey Gas & Oil Co.* v. *Checketts* (1951), 187 Fed. 2d 562.

Petitioner's brief to the Circuit Court reviewed the relevant New York case law on damages for wrongful death of infants or young adults in the intestate's age group The New York decisional law clearly demonstrated the disparity between the New York Appellate Court's assess-

ment of damages (between $30-$35,000.) and the instant verdict of $252,000.

Alfieri v. *Cabot Corp.*, 17 A. D. 2d 455 (1962), $180,000 reduced to $30,000, 17 year old male earning in excess of $5,000 per year who contributed $2600 per year to parents;

Breckir v. *Lewis*, 21 A. D. 2d 546 (1964), $75,000 reduced to $35,000, 21 year old bright female college student;

LeBoeuf v. *Newman*, 21 A. D. 2d 937 (1964), $55,000 reduced to $35,000, 17 year old male exceptional high school junior;

Lawler v. *Nucastle Motors Leasing Inc.* (A. D. 2nd Dept.) (1970), 317 N. Y. S. 2d 99, $55,000 reduced to $30,000, 23 year old working girl contributing $50 per week to divorced unemployed mother. It should be noted that plaintiff in the case at her bar works and is self-supporting.

Reason and logic dictate that in the instant case, solely a creature of New York Statutory Law, and where the Trial Court instructed the jury with respect to New York decisional law as to respondent's pecuniary loss, the Circuit Court was bound to apply New York decisional law in assessing respondent's measure of damages. The Circuit Court has stated:

> "The measure of damages for wrongful death is determined by the law of the place where the fatal injury occurred."
>
> *Frasier* v. *Public Service Interstate Transportation Co.*, 244 F. 2d 668 (C. C. A. 2, 1957).

If New York decisional law were not to be the cornerstone for this Court's inquiry into the excessiveness of the jury's verdict, it is submitted that chaos would result. However could a defendant fairly evaluate its responsibility for damages in Federal Court? Certainly if there were to be a separate rule or result, a race for a more lucrative forum would not be conducive to the even and fair administration of justice.

It is not the defendant who selects the choice of forum but the plaintiff. Thus a defendant who is involved in an accident in New York in assessing the rational limits of his responsibility must be able with a fair degree of reasonable certainty to know the depths of his obligation.

If there be one set of standards by which a defendant may determine the limits of his responsibility then the defendant is fairly protected. However, if because the plaintiff selects a Federal forum, defendant is placed in the position where a Court's assessment of a New York Federal jury's verdict is to be determined by a panoply of determinations made throughout 50 states with varying standards and all Federal Courts, the defendant is unprotected. Then the statement that the measure of damages is to be determined by the law of the place of accident is without meaning.

The disparity between the instant verdict and New York Appellate decisions in similar cases clearly required the Circuit Court to apply New York Law. The Circuit Court's refusal to apply New York Law was clearly error.

It is respectfully submitted that this Honorable Court should grant petitioner's writ to the Circuit Court.

The Circuit Court erred in misapplying the theory of discounting for present value to sustain a monstrous award.

The plaintiff herein, mother of the decedent was awarded $252,000. by the jury for the wrongful death of her son, an 18 year old college freshman.

In determining plaintiff's pecuniary loss under Article 5, *Estates Powers & Trusts Law*, §5-4.3, the District Court instructed the jury to discount any sum awarded for present value.

Under any theory of *Discounting for Present Value*, the recipient is to receive such a sum as the jury determines she had a right to expect from decedent for her life expectancy, discounted for present value.

By its very nature the verdict is demonstrably grossly excessive and monstrous, *Affolder* v. *New York, Chicago and St. L. R. Co.*, 339 U. S. 96. The award of $252,000. (which is non-taxable), if invested by plaintiff at 5%, a conservative interest rate, will yield $12,600 yearly without ever invading the principal. Even if this jury considered erroneously the deduction of counsel fees of one third, the resultant remainder of $168,000 invested at 5% would yield $8,400 for life without invading the principal. Thus to take the lesser figure of $8,400, plaintiff-appellee can really be seen to have been given an award of at least an additional $302,400.00 or a total of $480,400 based upon plaintiff-appellee's life expectancy of 36 years. (The jury did in fact ask the Trial Court a question as to attorney's fees.)

It is respectfully submitted that with an annual income as described above, it is highly unlikely that respondent will ever take the Circuit Court's suggestion in its opinion (p. 4a, Appendix) and invade the princi-

pal[illegible] provide herself with an annual income of $16,000. Respondent, 43 years of age, has always been gainfully employed and self-supporting and there was never any suggestion that her mode of living was substandard.

The Circuit Court in its opinion (Appendix p. 4a) stated:

> "If one calculates the annual income which Mrs. Hart would receive from the $252,000 award based on an investment interest of 6 per cent and also assuming that she would draw on principal as well as income so that at the end of her 35 year life expectancy there would be nothing left, she would have a yearly income of approximately $16,500."

This same Circuit Court has reversed a judgment for plaintiff where the District Court failed to properly discount for present payment, *O'Connor* v. *U. S.* (C. C. A. 2d 1959), 269 F. 2d 587. The standard is not whether plaintiff may choose her income level and need to invade principal but rather that plaintiff's standard of living is measured by plaintiff's pecuniary loss and the principal must be invaded to provide plaintiff's income.

This Honorable Court has criticized and/or reversed Circuit Court decisions which failed to properly compute damages, *Grunenthal* v. *Long Island R.R.*, 393 U. S. 156 (1968); *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474 (1933). The New York Courts approve the application of the Discount Theory, 1 *Pattern Jury Instructions*, 2:320, pp. 517, 518; Lawless, *Computation of Future Damages; A View from the Bench*, 54 Georgetown L. J. 4, 1131 (1966).

It is respectfully submitted that this Court should establish definitive standards for computing damages other-

wise one more link in the "Forum Shopping" chain will have been forged.

When the state court adheres to standards and the federal forum applies what may be termed loose and liberal standards, there can be no doubt that plaintiff's will and this plaintiff-respondent certainly did, invariably use the Federal Courts as the most lucrative forum.

It is respectfully submitted that this Court should grant petitioner's writ.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 926—September Term, 1970.

(Argued June 23, 1971 Decided July 21, 1971.)

Docket No. 71-1128

LUCIE DOLORES HART, as Administratrix of the Goods, Chattels and Credits of Timothy J. Hart, deceased,

Plaintiff-Appellee,

v.

VINCENT FORCHELLI and CHARLES N. FORCHELLI,

Defendants-Appellants.

Before:

SMITH and HAYS, *Circuit Judges,*
and POLLACK, *District Judge.**

Appeal from plaintiff's judgment in motor vehicle negligence death action on trial to the jury in the United States

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* United States District Judge for the Southern District of New York, sitting by designation.

Opinion of the United States Court of Appeals

District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*.

Affirmed.

EDWARD H. SCHIFF, New York, N. Y. (Thomas V. Kingham, Harold L. Cowin, New York, N. Y., of counsel), *for Defendants-Appellants*.

MARVIN V. AUSUBEL, New York, N. Y. (Emile Z. Berman and A. Harold Frost, New York, N. Y., of counsel), *for Plaintiff-Appellee*.

PER CURIAM:

This is an appeal from the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge*) from the award of damages by the jury of $252,000 in an automobile negligence death action. The sole ground for appeal is that the amount of the award is excessive.

The facts are relatively simple and not in dispute. The decedent, Timothy J. Hart, age 18, was killed in an automobile accident on the night of April 20, 1969 when he was a passenger in a car driven by the appellant, Charles N. Forchelli. At the time of the accident, Hart was a freshman at Syracuse University. He had been an outstanding athlete in high school as well as an accomplished scholar. He attended the University on a full scholarship standing fourth in an honors program and had tentative plans to become an attorney. His mother, Lucie Dolores Hart, the plaintiff in this action, was at the time of the accident forty-one years of age, in excellent health, and had a life

expectancy of thirty-five years. She had been abandoned by her husband some years before and was employed for $75 per week at the Catholic House of Retreat in Willimantic, Connecticut. There was evidence that the decedent had voiced his intention to support his mother so that she would not have to work as soon as he had finished his education.

The scope of review in the appellate courts in examining the excessiveness of a jury verdict is, of course, extremely limited. For many years the law in the federal courts was that an appellate court had no power at all to examine a jury's verdict in this regard. It was not until 1956 that this circuit departed from that position in *Comiskey* v. *Pennsylvania R.R.*, 228 F. 2d 687 (2d Cir. 1956). A few years later in *Dagnello* v. *Long Island R.R.*, 289 F. 2d 797 (2d Cir. 1961), Judge Medina examined the question with his customary thoroughness. He concluded:

> And so we hold we have the power to review the order of a trial judge refusing to set aside a verdict as excessive. If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether

> that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law. [*Id.* at 806.]

The standard we are to apply is hardly a precise one. As the Supreme Court noted in a footnote in its opinion in *Gruenthal* v. *Long Island R.R.*, 393 U. S. 156, 159 (1969):

> The standard has been variously phrased: "Common phrases are such as: 'grossly excessive,' 'inordinate,' 'shocking to the judicial conscience,' 'outrageously excessive,' so large as to shock the conscience of the court,' 'monstrous,' and many others."

Moreover, it is not particularly helpful to examine numerous state cases since federal juries are not bound by the amount that the New York juries have awarded or New York courts have approved or disapproved. *Brown* v. *Louisiana & Arkansas Ry.*, 429 F. 2d 1265 (5 Cir. 1970).

If one calculates the annual income which Mrs. Hart would receive from the $252,000 award based on an investment interest of 6 per cent and also assuming that she would draw on principal as well as income so that at the end of her 35 year life expectancy there would be nothing left, she would have a yearly income of approximately $16,500.

While it is true that an examination of the various New York and federal cases cited by both parties reveals this to be one of the largest awards on record in a wrongful death action with only one surviving dependent where that dependent is not the decedent's spouse, we are nevertheless unable to conclude that the amount is so unreasonable as to justify this court's intervention.

The judgment of the district court is therefore affirmed.

Judgment of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

LUCIE DOLORES HART, as Administratrix of the Estate of TIMOTHY J. HART, deceased,

Plaintiff,

—against—

VINCENT FORCHELLI and CHARLES N. FORCHELLI,

Defendants.

This action came on for trial before the Court and a jury, Honorable Jack B. Weinstein, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged the plaintiff recover of the defendants the sum of Two Hundred Fifty Two Thousand ($252,000.00) Dollars together with interest at the rate of six (6%) percent per annum from April 20, 1969 to the date of judgment, to wit, Twenty Five Thousand Two Hundred ($25,200.00) Dollars, making a total of Two Hundred Seventy Seven Thousand Two Hundred ($277,200.00) Dollars, together with interest as provided by law and costs when taxed.

Dated at Brooklyn, New York, this 21st day of December, 1970.

JOHN B. WEINSTEIN
U.S.D.J.

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OCTOBER TERM, 1971

No. 71-367

VINCENT FORCHELLI and CHARLES N. FORCHELLI,
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v.

LUCIE DOLORES HART as Administratrix of the Estate of TIMOTHY J. HART, Deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

VINCENT FORCHELLI and CHARLES N. FORCHELLI,
Petitioners,

v.

LUCIE DOLORES HART as Administratrix of the Estate of TIMOTHY J. HART, Deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

1. Is certiorari warranted to review the size of a jury's verdict when the trial judge and a unanimous Court of Appeals have held that the recovery is not so unreasonable as to justify the Court's intervention?

Statement of the Case

This is a diversity action in negligence to recover damages for the wrongful death of plaintiff's intestate. Plaintiff, the mother and personal representative of her intestate alleged in her complaint, and defendants admitted in their

answer, that on April 20, 1969, the decedent was a passenger in an automobile owned by defendant Vincent Forchelli and operated with his consent by defendant Charles N. Forchelli in an easterly direction along James Street approaching its intersection with Sedgwick Street in Syracuse, New York. It was further alleged that defendant Charles N. Forchelli allowed the subject vehicle to go out of control striking a pole at the said intersection resulting in the death of the intestate (4A-7A).

The case was tried before Judge Jack B. Weinstein and a jury on December 17 and 18, 1970. The jury returned a verdict in favor of plaintiff in the sum of $252,000. Post-trial motions to set the verdict aside were denied. Defendants appealed from the judgment dated December 21, 1970 which was based upon this verdict (172A-176A). The appeal was limited to the sole issue of the alleged excessiveness of the verdict. A unanimous Court of Appeals for the Second Circuit affirmed the judgment.

Facts

Timothy J. Hart was born on October 24, 1950 (83A, 25E). He was the only child of the plaintiff and her husband (83A). When Tim was ten to twelve years old his father abandoned him and his mother (83A). From that time on his father never provided for him or his mother (83A). Indeed, the plaintiff had not seen her husband in some eight to ten years (83A).

Because her husband abandoned her, the plaintiff was forced to go to work (83A). She secured a job as a clerk in a "one-girl" office at a Catholic House of Retreat in Willimantic, Connecticut (83A). She works there "at least six days a week" and earns $75 a week take-home pay (83A). Tim was brought up by his mother (83A).

Tim Hart attended St. Mary's Parochial School in Willimantic (84A). He was the top student in his class and,

upon his graduation, was awarded a $100 scholarship by the Honor Society (84A, 22E, 23E). While attending grade school, he was active in the boy scouts, advancing as far as Explorer Scout, and earned an award for his outstanding achievements in scouting (84A, 28E).

Upon his graduation from grade school he went to Windham High School, a public high school in Willimantic (85A). While at high school he achieved a 92.09% average, graduating 6th in a class of 246 (85A, 29E). On various I.Q. tests he scored 138, 134, 133 and 128 (85A, 29E).

He was one of few selected by the faculty to be in a special honors program (108A). His English honors teacher described him as "one of the most conscientious students, one of the best students I have had since I began teaching that course ten years ago" (108A). Apparently he had a penchant for reading, learning, thoroughness of research, and writing (88A, 92A, 108A, 109A). He took a special speedreading course at night at the Evelyn Woods School and was the first one to secure an award at that school for unique accomplishment (88A, 89A).

He was elected to the National Honor Society in his third year, a "selection made by the faculty on the basis of scholastic achievement, character and personality" (86A, 31E). The award was particularly noteworthy since it was given to him and a few others in their junior year, a recognition that he was one "of the very best in his class" (31E). In his senior year he was elected Treasurer of the Honor Society (86A, 29E).

In 1967, after taking a qualifying examination, and scoring in the top 2% of those taking the examination, he was awarded a Letter of Commendation by the National Merit Scholarship Program (87A, 32E).

He received three letters, playing on the football team in all four high school years, on the baseball team in his first and second years, and on the track team in his third

and fourth years (85A, 29E). In his first and third years he was elected to and served on the Athletic Council (86A, 29E). He was also co-chairman of the sophomore dance (86A, 30E).

In addition he spent a lot of time on charitable work for the "Aiding Leukemia Stricken American Children" and was co-chairman of one of its drives (88A, 35E, 36E).

During the course of his high school career he was elected Class President in his junior year (86A, 29E). In his senior year he was elected by his fellow students as president of the student body, the Student Council and served with the approval of the faculty (86A, 110A, 29E).

He was interested in going to Syracuse University as an undergraduate (88A). In preparation for college admission he took the Preliminary Scholastic Aptitude tests in his junior year and his college boards in his senior year (112A). He scored in the top 1% nationally on each set of examinations (112A).

His guidance counselor recommended him for the Most Valuable Student Scholarship (112A); his English teacher also recommended him for a scholarship (110A). Based upon competitive examinations, he was awarded a Connecticut State Scholarship which gave him $1,000 per year (90A, 95A, 33E). He was also given a full tuition scholarship to Syracuse University (90A). The Elks National Foundation offered him a third scholarship award which he turned down (90A, 34E).

While in high school, his name appeared in "Who's Who Among the American High School Students" (88A, 37E). Less than 5% of the graduating seniors throughout the country are selected for his honor (37E).

From the time Tim was ten he worked a newspaper route (84A). He continued with that route until he was sixteen (89A). He then took a job at a nursery working

after school, on weekends and during the summer (89A, 44E, 45E). He continued working throughout high school after school, nights, weekends, holidays and summers (89A, 90A, 94A, 95A, 44E, 45E, 46E). One of his employers during this period testified about his exceptional work habits and industry (106A, 107A).

In his senior year of high school, 1968, he worked from April to September after which he matriculated at college (89A, 94A, 95A). During this period he earned $1,025.35 (89A, 46E). Obviously recognizing his mother's plight he turned over most of his earnings to his mother (89A).

Syracuse University was the college of his choice (88A). Prior to his matriculation at that college in September, 1968, he was invited to, and was accepted in that school's Honors Program "designed for the more able and academically ambitious students" (91A, 38E, 39E). Prior to his death he had completed the first half of his freshman year earning four A's and three B's (92A, 43E). He ranked fourth in his class and made the Dean's List (41E, 63A, 92A). He was also a reporter on a school publication and had one article published (93A).

Besides his scholastic performance at college, beginning in November, 1968 and up to the subject accident, he worked three nights a week at a snack bar in his dormitory (64A, 91A). He earned on the average of $20 a week which he used for spending money (91A). Moreover, he pledged for membership in the Kappa Sigma fraternity where he partook of their social, athletic and other activities to the total satisfaction of his pledge trainer, the defendant Charles N. Forchelli (55A, 64A, 91A).

Tim was interested in law and political science and intended to have a career as a lawyer (87A, 92A, 109A, 110A). He planned to go for his postgraduate schooling to Columbia or Harvard Law Schools (87A). Defendants' trial counsel acknowledged in his opening statement and

summation that the decedent was outstanding and an appropriate candidate for a tuition-free law school scholarship (25A, 125A, 127A).

The plaintiff and the decedent were a closely knit, interdependent family (83A, 88A, 89A, 92A, 93A). Each was virtually the only family the other had (92A). Mrs. Hart struggle to make available every educational opportunity and chance for advancement for her son, notwithstanding her limited means and the privation it exposed her to (88A). The scholarships paid for the decedent's school tuition, his earnings at night took care of his expense money, but she contributed $780 a year for his room and board at college (94A, 95A).

On the other hand, the decedent's concern was his mother (92A, 109A). He talked about providing for her (92A, 109A). "That was always his first thought in mind" (92A). He wanted to relieve his mother of the burden of working (93A). He was helpful to his mother around the house and respectful to her (93A).

Shirley Baldwin, English teacher at Windham High School for twenty-two years (107A, 108A) succinctly and persuasively testified concerning Tim's concerns, aspirations and plans:

> "He had great aspirations as far as his future is concerned. He spoke to me several times about his aspirations, especially being a lawyer. He was extremely concerned about his mother and spoke to me several times about the fact that he wanted to be able to provide . . .
>
> As I was saying, he spoke to me about his concern for his mother, and how he wanted to be able to provide for her when he was out earning his own living. He spoke to me several times about wanting to be a lawyer, especially." (109A, 110A)

In his opening statement and summation, trial counsel for defendants conceded the absence of any defense evidence to mitigate the damages, the unusual qualities of the decedent and his mother, and that no doubt the decedent would have supported his mother had he lived (25A, 27A, 125A, 126A, 129A).

The decedent was in excellent health when he was killed (93A). He was eighteen years old when he died and then had a life expectancy, according to the mortality tables, of 52.1 years (113A). He left him surviving his mother, then 41 years old, and just under 43 years of age as of the date of trial (83A, 24E). She was in excellent health (93A) and had a normal life expectancy, according to the mortality tables, of 35 years as of the time of trial (113A, 114A).

It was stipulated that the decedent died as a result of the injuries he sustained in the subject accident (98A). The funeral, burial and ambulance bills totaled in excess of $2,000 (47E-49E, incl.).

Prior to charging the jury, the Court submitted a copy of his charge to counsel for review (152A). Defense counsel then took no exception to the charge (170A).

Defendants make specific note at page 5 of their petition about the propriety of Judge Weinstein's charge. Indeed, following rendition of the charge defense counsel made a statement for the record that he took no exception to the charge either before or after it was given (170A).

The jury returned a verdict for the plaintiff in the sum of $252,000 (172A). Defendants' motions to set the verdict aside, including grounds of excessiveness, were denied (174A, 176A). The judgment of the District Court was unanimously affirmed by the Court of Appeals for the Second Circuit.

POINT I

The petition fails to demonstrate that this simple case of a wrongful death recovery for an automobile passenger falls within the ambit of the extremely limited certiorari jurisdiction, pursuant to Rule 19 of the Supreme Court Rules.

Certiorari jurisdiction is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. This is made plain by Rule 19 of the Supreme Court Rules as well as the authorities (*See Rogers* v. *Missouri Pacific R.R.*, 352 U. S. 524, 531-532, 77 S. Ct. 443, 459, 463-464, 1 L. Ed. 2d 493, 520, 523-524 [1957], and citations collected in opinion of Frankfurter, J.; Harlan, *Manning the Dikes: Some Comments on Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States*, 13 The Record of the Assoc. of the Bar 541 [1958]).

The record and the decision of the Court of Appeals patently demonstrate that this is a classic case of non-reviewability by this court. The sole issue which defendants raised on appeal was the alleged excessiveness of the jury's verdict. This court has defined the limited scope of review of this issue. (*Gruenenthal* v. *Long Island R.R.*, 393 U.S. 156, 89 S. Ct. 331, 21 L. Ed. 2d 309 [1968]; *Neese* v. *Southern R.R.*, 350 U.S. 77, 76 S. Ct. 131, 100 L. Ed. 60 [1955]; *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481, 53 S. Ct. 252, 77 L. Ed. 439 [1933]. *See also* 3 W. Barron & A. Holtzoff, Federal Practice and Procedure § 1302.1, at 345, 350 [Wright ed. 1958]).

Moreover, federal law clearly governs the question of the scope of review. (5 J. Moore, Federal Practice § 50.06, at 2350 [2d ed. 1969]). In this connection the Court of Appeals noted in its decision that ". . . it is not

particularly helpful to examine numerous state cases since federal juries are not bound by the amount that New York juries have awarded or New York courts have approved or disapproved." This language is completely consistent with all the authorities. *Brown* v. *Louisiana & Arkansas R.R.*, 429 F. 2d 1265, 1267 (5th Cir. 1970); *Accord, Southern Farm Bureau Casualty Ins. Co.* v. *Palmer*, 263 F. 2d 206, 209 (5th Cir. 1959); *Hubbard* v. *Long Island R.R.*, 152 F. Supp. 1, 2 (E.D.N.Y. 1957).

The Court of Appeals for the Ninth Circuit is in complete accord with the subject decision. Thus, in *Union Pacific R.R.* v. *Jarrett*, 381 F. 2d 597, 602 (9th Cir. 1967), plaintiff recovered $60,000 under the Idaho Wrongful Death Act. The trial judge refused to interfere with the jury's determination. The Court of Appeals affirmed.

> *The statutory standard is wide; damages are to be awarded "as under all the circumstances of the case may be just."* Idaho Code § 5-311. *And the question is primarily for the jury.* Where no excess appears as a matter of law, the refusal of a trial judge to reduce the award or grant a new trial on damages is not open to review. (Emphasis added)

The appellants in that case, as the defendants in this case, cited the history in *Covey Gas & Oil Co.* v. *Checketts*, 187 F. 2d 561 (9th Cir. 1951).

> In that case this court granted remittitur of a judgment entered in the Idaho District Court. We ordered it to reduce a $35,000 judgment for the death of an 8 year old boy to $20,000 upon the consent of the plaintiffs, or in the alternative to grant a new trial. But this action was taken *solely because of the previous action of the state courts* and in order to avoid forum shopping. *The plaintiffs in Covey had originally brought their action in the state courts.* See Checketts v. Bowman, 1950, 70 Idaho 463, 220 P.2d

682. A verdict of $40,000 was returned in that action, but the state trial judge ruled that it was excessive and reduced it to $20,000. The state supreme court affirmed the exercise of discretion by the trial judge, but gave the plaintiffs the alternative of accepting the reduction or a new trial. The plaintiffs dismissed the action and brought it again in the federal court as a diversity case. This court followed the lead of the state supreme court which followed the lead of the state trial court. *Covey is not authority for interfering with the discretion exercised by the judge and jury here.* (Emphasis added)

It is interesting to note that the same elastic standard obtains under the New York Wrongful Death Act. It provides that "(T)he damages awarded to the plaintiff may be such sum as the jury . . . deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought" (N. Y. Est., Pow. and Tr. Law § 5-4.3 [McKinney 1967]).

Nor is the subject decision inconsistent with *Fraisier* v. *Public Service Interstate Transp. Co.*, 244 F. 2d 668, 670 (2d Cir. 1957). In that case plaintiff recovered, in a state court action, $90,000 for the wrongful death of a decedent with a modest earning experience. That judgment was subsequently reversed on several grounds, including excessiveness, by the New York Appellate Division. Thereafter plaintiff commenced an action in the United States District Court for the Eastern District of New York where she recovered $115,000. This judgment was affirmed, the court writing:

> Of course the district court is not bound by this decision of the Appellate Division which was at best a tertiary ground for its reversal.

Defendants, at pages 8, 10 and 11 of their petition engage in some irrelevant and fanciful discussion of New York choice-of-law rules, selection of forums and expectations of drivers.

First, New York no longer adheres to the *lex loci* rule in conflict of laws cases. It is now the New York choice-of-law rule that the law of the jurisdiction having the most substantial interest in the specific issue in controversy governs. (*Babcock* v. *Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 279 [1963]; *Miller* v. *Miller*, 22 N. Y. 2d 12, 237 N. E. 2d 877 [1968]; *Tooker* v. *Lopez*, 24 N. Y. 2d 569, 249 N. E. 2d 394 [1969] *Arbuthnot* v. *Allbright*, 35 App. Div. 2d 315, 216 N.Y.S. 2d 391 [3rd Dep't 1970]).

Second, it is not always the plaintiff who selects the forum. The plaintiff may opt for the state court and be removed by a foreign defendant to a federal district court (28 U.S.C. § 1441[a] [1964]).

Third, when a driver assumes control of an automobile he does not anticipate that he will be involved in an accident. If he were involved in an accident he could scarcely anticipate who would be the victim of the accident, where he might be sued, and what law would govern the measure of damages recoverable.

In addition, in actions for wrongful death involving young decedents, such as plaintiff's intestate in the case at bar, New York recognizes that damages may be assessed on the decedent's future and potential earning capacity. In *Grayson* v. *Irvmar Realty Corp.*, 7 App. Div. 2d 436, 439, 184 N.Y.S. 2d 33 (1st Dep't 1959), Mr. Justice Breitel wrote:

> As already noted, it is undisputed that a person tortiously injured is entitled to recover for impairment of future earning capacity, without limitation to the actual earnings which preceded the accident. (citing authority)

> In death actions, and in cases of injuries, involving very young people whose vocational potentialities have not yet been developed, the courts have allowed assessment of damages based on future, and not presently realized, earning capacity. (citing authorities)
>
> The courts have also allowed juries to assess damages on future earning capacities based in turn upon probable promotions (citing authorities).
>
> In the case of young people engaged in the study for occupations or professions requiring a great deal of preliminary or formal training the courts have also permitted the assessment of damages based on future earning potential after the training period would have been completed. (citing authorities)

Moreover, the New York Court of Appeals in *Loetsch* v. *New York City Omnibus Corp.*, 291 N. Y. 308, 310, 52 N. E. 2d 448 (1943), indicated the significance of the relations between the decedent and the person for whose benefit the action is maintained, in this case the decedent's mother, and the decedent's disposition voluntarily to provide for the beneficiary during her life.

Given the factors which the triers of the fact had the right to consider in the instant case in assessing the pecuniary loss to the plaintiff, and the extremely limited scope of appellate review of the trial court's denial of the motion for a new trial based upon excessiveness, the decisions below were manifestly proper. This is demonstrated by prior decisions.

In *Grunenthal, supra,* a personal injury case, plaintiff sought $250,000 damages in his complaint. A jury returned a verdict of $305,000. The trial judge granted plaintiff leave to amend the *ad damnum* of the complaint to the amount of the verdict after it was returned and denied defendant's motion to set the verdict aside as ex-

cessive. The Court of Appeals granted the defendant a new trial unless the plaintiff agreed to remit $105,000 of the verdict (388 F. 2d 480, 1968). This court reversed with a direction to the Court of Appeals to enter a judgment affirming the trial court's judgment. A careful analysis of this court's opinion indicates the wide latitude given the jury in its assessment of damages, the great discretion possessed by the trial judge, and the limited reviewability of such determination by an appellate court.

Of equal significance is the *Neese* case, *supra*. That case concerned the death of a 22-year old railroad car inspector who left him surviving a mother, 47 and a father, 60. The decedent's total take-home pay for his more than 3-year period of employment with defendant was approximately $6,500; his unwithdrawn deposits during the same period were approximately $5,000. The father of the decedent was earning $4,300 per year as a railroad car inspector at the time of the decedent's death. The parents testified that the decedent was contributing $30 to $40 a month to the family and for a brief period before his demise about $75 a month although, on the basis of his earnings and savings, the maximum he could have contributed was an average of less than $45 a month.

A jury returned a verdict of $60,000. The trial judge granted a remittitur of $10,000 and judgment was entered for $50,000. The Court of Appeals considered the evidence of pecuniary loss at some length under a Wrongful Death Act adopting Lord Campbell's Act and employing the same standard of recovery as obtains in New York. It found that the sum of $50,000 was "far beyond the pale of any reasonable probability and entirely without support in the record" (216 F. 2d 772, 776, 4th Cir. 1954) and granted a new trial on the limited issue of plaintiff's damages. This court reversed and wrote:

> We reverse the judgment of the Court of Appeals . . . without reaching the constitutional challenge to

> that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive. Even assuming such appellate power to exist under the Seventh Amendment, we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion. For apart from that question as we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals.

Few New York state court decisions dealing with wrongful death awards have reported the specific facts in the of state court verdicts. Nevertheless, there is persuasive case and thus it is at times difficult to determine the ambit state court authority and precedent for the propriety of the instant verdict.

The decision of *Shukri* v. *O'Neill*, 19 App. Div. 2d 697, 241 N.Y.S. 2d 1021 (2d Dep't 1963), *appeal denied*, 13 13 N.Y. 2d 597, 243 N.Y.S. 2d 1026 (1963), which is particularly relevant to the subject case, does not recite the facts. Accordingly we shall refer to the folio references in the record on appeal in that case.

The decedent David Shukri was 25 years of age and single at the time of his death. He had completed but six or seven terms in high school (996, 2061). A year before his death he purchased a truck to go into the trucking business and it was alleged that he had gross earnings of about $300 per week from his truck operation although no formal records were kept (1009, 1015-1016). Plaintiff produced no confirmatory records or tax returns concerning decedent's income.

The plaintiff, decedent's mother, claimed he turned over about $100 per week for the support of his family and oc-

casionally paid other bills (1016, 1019). At the time of his death decedent left him surviving a 47-year-old mother (1011, 2061) and a 52-year-old invalid father (2061) who died less than a year and a half following decedent's demise (1034). He also had two brothers and three sisters all of whom were in good health (1112, 2061).

The plaintiff retained an attorney to prosecute a cause of action for wrongful death of the decedent under a one-third contingent retainer (1087-1088). The defendants were associate counsel and permitted the suit to be dismissed for lack of prosecution. There followed this malpractice suit.

The trial court instructed the jury that if the defendants were liable they should calculate the amount of pecuniary loss under the New York Wrongful Death Act which the plaintiff would have recovered in the initial action together with interest from the date of death to the date of the verdict, then subtract from that sum one-third which the defendants would have received as attorneys' fees, and then add to that net sum whatever interest the plaintiff would have earned on the net recovery from that time to the date of the subject verdict (2100-2111).

The jury returned a verdict in the sum of $145,000 (2151). Considering the element of attorneys' fees, this verdict was calculated as the equivalent of a finding of $167,308 of pecuniary loss (Brief for Appellant at 39, App. Div.).

Defendants' petition cites a number of decisions, principally in the state court, providing for remittiturs in certain factually distinguishable wrongful death actions.

In *Alfieri* v. *Cabot Corp.*, 17 App. Div. 2d 455, 235 N.Y.S. 2d 753 (1st Dep't 1962), *aff'd*, 13 N.Y. 2d 1027, 195 N. E. 2d 310 (1963), the decedent earned $5,000 a year and contributed $50 a week to both parents who had a life ex-

pectancy of 21 years. Similarly, in *Lawler* v. *Nucastle Motors Leasing Inc.*, 35 App. Div. 2d 450, 317 N.Y.S. 2d 99 (2d Dep't 1970), the decedent contributed $50 a week to her mother with no reasonable prospects for equal or greater contributions in the future.

Breckir v. *Lewis*, 21 App. Div. 2d 546, 251 N.Y.S. 2d 77 (1st Dep't 1964), *aff'd sub nom. Breckir* v. *Pleibel*, 15 N. Y. 2d 1027, 207 N. E. 2d 865 (1965), and *Lawler* v. *Nucastle Motors Leasing Inc.*, *supra*, involved the wrongful deaths of young women. The Courts presumed that these decedents would marry, have families of their own, stop working and would thereafter care for their own families. These are not problems which men have after marriage. Moreover, in these cases neither decedent had any special pecuniary potential. Jane Breckir was not preparing herself for any profession; Sue Lawler was a secretary with an extremely limited earning capacity. Jane Breckir did not contribute nor contemplate contributing to the support of her self-sufficient, well-to-do parents.

In *LeBoeuf* v. *Newman*, 21 App. Div. 2d 937, 251 N.Y.S. 2d 72 (3rd Dep't 1964), the decedent manifested no special intellectual abilities or talents, was not preparing himself for a professional career and left him surviving a father who was supporting his next-of-kin, his mother and father.

On the other hand, Tim Hart planned a career as a lawyer. It is a matter of public knowledge, of which this court may take judicial notice (*Hunter* v. *New York, Ontario & Western R.R.*, 116 N. Y. 615, 23 N. E. 9 [1889]; *American Legion Post No. 90* v. *First Nat. Bank & T. Co.*, 113 F. 2d 868, 872 [2d Cir. 1940]; *Pierce* v. *New York Central R.R.*, 304 F. Supp. 44 [W. D. Mich. 1969]), that Wall Street law firms are now paying lawyers fresh out of law school, without experience, $16,000 per annum, $17,500 per annum with one year of experience and $19,000 to $19,500 per annum with two years experience. New York Law Journal, Oct. 23, 1970, at 1, cols. 4, 5; Wall

Street Journal, Oct. 21, 1970 at 8 col. 3. The scale of earnings for those with more than two years experience follows an upward progression. Most assuredly the earning capacity of an attorney who charted the decedent's course of education and training was exceptionally great.

In summary, the jury had the right to consider the following undisputed facts:

1. Tim Hart was a brilliant young man whose intelligence test results and scholastic accomplishments placed him amongst the top 1% of his contemporaries. He possessed special qualities of leadership and sociability. There is no doubt that he had the talent, motivation, drive and industry to earn an income comparable to the earnings enjoyed by the most generously rewarded persons in our entire society. Moreover, he was zealously preparing himself for a professional career which would have afforded him such an opportunity and such an earning capacity.

2. The decedent had dedicated his life to providing handsomely for his mother for the rest of her life. It was his mother who bore the sole burden of raising and rearing him after his father abandoned him, at a great personal sacrifice to her. He was sensitive to her financial plight and determined that she should stop working. She was virtually the only family he had and he, in turn, the only family she had. The relationship was extremely close. It was he alone that she looked to for her future well-being.

3. The plaintiff was 41 years old at the time of her son's death and not quite 43 years old at the time of trial. She is in good health. She has a reasonable life expectancy in excess of 35 years. The decedent would have made available pecuniary advantages in the form of substantial sums in support as well as other services during this period.

As the Court of Appeals aptly noted of this case, "(T)he facts are relatively simple and not in dispute." Defendants seek to have this court review what is nothing more nor less than a simple factual issue, to wit, the amount of plaintiff's damages. This issue has been clearly decided and nothing further remains for review.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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